

First Supplement to Memorandum 99-51

Administrative Rulemaking: Trade and Commerce Agency Proposals

In its most recent annual report, the Regulation Review Unit of the Trade and Commerce Agency (RRU) discusses a number of problems it perceives with the existing rulemaking procedure. The staff has reviewed these problems and believes that three of them should be considered by the Commission.

Tracking Number

The RRU describes the difficulty an interested person might have in tracking a proposed regulation from cradle to grave due to the lack of any consistent system for identifying a regulatory proposal. When an agency is proposing a regulation, it may assign an identifying number to the proposal for its own use. When notice of the proposed rulemaking is published in the California Regulatory Notice Register, the Office of Administrative Law (OAL) assigns the proposal a filing number. When the regulation is later submitted to OAL for review, it is assigned yet another identifying number by OAL.

The RRU believes that a regulation should be assigned a single identifying number when it is published in the California Regulatory Notice Register. That number would be used for all purposes, simplifying the task of tracking the proposal.

According to OAL, it is currently revamping its computer system to avoid issuing two different OAL numbers to a regulatory proposal. This should be complete within a year. In light of this pending administrative solution, the staff recommends against any legislation addressing the issue. However, it may be appropriate to check back with OAL at a later date to learn how the problem has been addressed.

Access to Final Statement of Reasons

When a person raises an objection or makes a recommendation regarding a proposed regulation during public comment, the adopting agency is required to respond to the comment in its final statement of reasons. See Gov't Code § 11346.9(a)(3). However, there is nothing in the rulemaking procedure that

requires the agency to provide its final statement of reasons to the commenter. This means that a person who wants to find out how (or if) the agency responded to the comment bears the burden of acquiring the final statement of reasons.

The RRU believes that the burden should be on the agency to provide a copy of its final statement of reasons to anyone who commented and requests a copy. According to OAL, this is already the practice of many rulemaking agencies. The Commission should consider whether it should be required by statute. This could be done by adding a subdivision to Section 11346.9 to read as follows:

11346.9. ...

(d) The agency shall mail a copy of the final statement of reasons to any person who has requested a copy and who raised an objection or made a recommendation that is specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

This language limits the mailing to person whose comments must be responded to in the final statement of reasons. Alternatively, the scope of the required mailing could be broadened to require mailing of the final statement of reasons to anyone who submitted a comment and requested a copy, or simply to anyone who requested a copy.

Another possibility would be to require an agency that has a website to publish its final statement of reasons on its website. This would probably not be a complete substitute for mailing, since some interested persons will not have the means or inclination to access the website. This could be implemented by revising proposed Section 11340.8 to read as follows:

11340.8. ...

(c) An agency that maintains an Internet website or other similar forum for the electronic publication or distribution of written material shall publish ~~any public notice required by this chapter~~ the following items on that website or other forum.

(1) Any public notice required by this chapter. For the purposes of this subdivision paragraph, "public notice" means a notice that is required to be given by an agency to persons who have requested notice of the agency's regulatory actions. Publication under this subdivision paragraph is in addition to any other required form of publication.

(2) The final statement of reasons required by Section 11346.9(a).

~~(d) This subdivision does not require~~ Nothing in this section requires an agency to establish or maintain a website or other

forum for the electronic publication or distribution of written material.

(d) (e) ...

Notice of Abandonment

Under existing law, an agency is not required to provide any kind of notice when it abandons a proposed regulation. A person who is interested in the proposed regulation will not know that the proposal is abandoned until the one-year time limit on the rulemaking process has run without the regulation being adopted or re-proposed. Obviously, a person who is interested in a proposed regulation would find it useful to know that the proposed regulation had been abandoned.

The RRU proposes that an agency be required to formally notify OAL when it abandons a proposed regulation. OAL would then publish notice of that decision in the California Regulatory Notice Register. This would be helpful to those interested in the proposed regulation and would not impose much of an administrative burden on the agency — a brief letter to OAL would suffice in most cases. The simplest way to implement this would be to add a new section:

11347.4. If an agency decides not to adopt a proposed regulation it shall provide written notice of that fact to the office. The office shall then publish notice of the decision in the California Regulatory Notice Register.

Respectfully submitted,

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